

United States
Court of Appeals
for the Ninth Circuit

EVERT L. HAGAN, Administrator of the Estate
of J. A. Hagan, Deceased,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED

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Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. 4-6-56

PAUL P. O'BRIEN, CLERK

No. 14957

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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United States District Court for the Southern
District of California, Central Division

Civil Action No. 17876-WB

EVERT L. HAGAN, Adm. of the Estate of J. A.
Hagan,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Plaintiff complains of the United States of America and alleges as follows:

I.

Jurisdiction of this action is conferred by Section 1346(a) (1) of Title 28 of the United States Code.

II.

Plaintiff is the duly qualified and acting administrator of the Estate of J. A. Hagan, and a citizen of the United States and resides at 115 N. Eastern Avenue, Los Angeles County, in the State of California.

III.

This action is one to recover an income tax erroneously and illegally assessed and collected without authority under the Internal Revenue Laws of the United States, pursuant to authority to sue by Section 1346(a) (1) of Title 28 of the United States Code.

IV.

Plaintiff alleges that upon March 15, 1946, J. A. Hagan, doing business as the El Rey Cheese Company made a return for the calendar [2*] year 1945; that said return showed a net income subjecting the said J. A. Hagan to the payment of a tax in the amount of \$592.04, which amount was remitted to the Collector of Internal Revenue at Phoenix, Arizona.

Plaintiff alleges that the El Rey Cheese Company was a fictitious name registered by J. A. Hagan under the Civil Code of the State of California and doing business at 115 N. Eastern Avenue, Los Angeles 22, California. Plaintiff alleges that Evert L. Hagan was acting as attorney-in-fact in the management of said business for J. A. Hagan and that Evert L. Hagan had furnished operating capital to said business in amount in excess of \$50,000. Plaintiff alleges that though the business was registered in the name of J. A. Hagan that by virtue of the various dealings of J. A. Hagan and Evert L. Hagan with said El Rey Cheese Company that there existed between J. A. Hagan and Evert L. Hagan in fact a partnership.

Plaintiff alleges that upon January 9, 1950, the Commissioner of Internal Revenue filed a notice of Jeopardy Delinquent tax assessment against Evert L. Hagan for the year 1945 claiming deficiencies in the sum of \$9,276.96, and based the same upon the alleged income of the El Rey Cheese Company.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

Plaintiff alleges that Evert L. Hagan in the proper time filed a Petition for redetermination of the tax liability for the year 1945. Plaintiff alleges that a re-audit of all the books, records and original papers of the El Rey Cheese Company for the year 1945 showed that there had been no actual net income to Evert L. Hagan or J. A. Hagan in any amount on account of operations of that company for that year.

Plaintiff alleges that after the aforesaid re-audit of the records of the El Rey Cheese Company for 1945, an agent of the Internal Revenue Bureau checked the same; that by stipulation in Docket No. 27441 United States Tax Court entitled "Evert L. Hagan, Petitioner vs Commissioner of Internal Revenue, Respondent" it was agreed that there was no tax liability upon Evert L. Hagan for the year 1945 on [3] account of net income arising out of the operation of the El Rey Cheese Company; that the stipulation was adopted by the Tax Court in disposing of the tax liability of Evert L. Hagan.

Plaintiff alleges that said stipulation and its subsequent adoption by the Tax Court constituted a determination as contemplated under Section 3801 of the Internal Revenue Code; that the effect of the same with regard to the right of J. A. Hagan, the partner in fact of Evert L. Hagan, to claim a tax refund was to allow an adjustment, correction and refund notwithstanding the fact that the ordinary period of limitation for claiming the same had run.

V.

On September 6, 1952, plaintiff filed with the Collector of Internal Revenue at Phoenix, Arizona, a claim for refund for \$592.04 plus interest, of the tax paid for the year 1945. A true copy of said claim and of the statement attached thereto is hereto attached marked "Exhibit A" and is made a part of this complaint.

VI.

Said demand for refund has been refused by defendant through its Commissioner of Internal Revenue, in the form of a registered letter dated January 27, 1955, a true copy of which is hereto attached and marked "Exhibit B."

VII.

Plaintiff's claim does not exceed \$10,000 in amount.

And for a Second and Further Cause of Action:

I.

Plaintiff by reference realleges and reavers all of the allegations contained in Paragraphs I, II, III, VI and VII of his first cause of action to the same effect as if they were fully pleaded herein.

II.

Plaintiff alleges that upon March 15, 1947, J. A. Hagan doing business as the El Rey Cheese Company made a return for the calender year 1946; that said return showed a net income subjecting

the said [4] J. A. Hagan to the payment of a tax in the amount of \$3,181.95, which amount was remitted to the Collector of Internal Revenue at Phoenix, Arizona.

Plaintiff alleges that the El Rey Cheese Company was a fictitious name registered by J. A. Hagan under the Civil Code of the State of California and doing business at 115 N. Eastern Avenue, Los Angeles 22, California. Plaintiff alleges that Evert L. Hagan was acting as attorney-in-fact in the management of said business for J. A. Hagan, and that Evert L. Hagan had furnished operating capital to said business in amount in excess of \$50,000.00. Plaintiff alleges that though the business was registered in the name of J. A. Hagan that by virtue of the various dealings of J. A. Hagan and Evert L. Hagan with said El Rey Cheese Company that there existed between J. A. Hagan and Evert L. Hagan in fact a partnership.

Plaintiff alleges that upon January 9, 1950, the Commissioner of Internal Revenue filed a notice of Jeopardy Delinquent Tax Assessment against Evert L. Hagan for the year 1946 claiming deficiencies of approximately \$51,000.00, and based the same upon the alleged income of the El Rey Cheese Company. Plaintiff alleges that Evert L. Hagan in the proper time filed a Petition for redetermination of the tax liability for the year 1946. Plaintiff alleges that a re-audit of all the books, records and original papers of the El Rey Cheese Company for the year 1946 showed that there had been no actual net income

in any amount on account of operations of that company for that year.

Plaintiff alleges that after the aforesaid re-audit of the records of the El Rey Cheese Company for 1946, an agent of the Internal Revenue Bureau checked the same; that by stipulation in Docket No. 27441 United States Tax Court entitled "Evert L. Hagan, Petitioner, vs Commissioner of Internal Revenue, Respondent" it was agreed that there was no tax liability upon Evert L. Hagan for the year 1946 on account of net income arising out of the El Rey Cheese Company; that the stipulation was adopted by the Tax Court in disposing of the tax [5] liability of Evert L. Hagan.

Plaintiff alleges that said stipulation and its subsequent adoption by the Tax Court constituted a determination as contemplated under section 3801 of the Internal Revenue Code; that the effect of the same with regard to the right of J. A. Hagan, the partner in fact of Evert L. Hagan, to claim a tax refund was to allow an adjustment, correction and refund notwithstanding the fact that the ordinary period of limitation for claiming the same had run.

III.

On September 6, 1952, plaintiff filed with the Collector of Internal Revenue at Phoenix, Arizona, a claim for refund for \$3,181.95 plus interest, of the tax paid for the year 1946. A true copy of said claim and of the statement attached thereto is hereto attached, marked "Exhibit C" and is made a part of this Complaint.

Wherefore, plaintiff prays as follows:

- (1) For judgment in the amount of \$592.04 plus interest, on account of the wrongful payment of income taxes for the year 1945; and,
- (2) For judgment in the amount of \$3,181.95, plus interest, on account of the wrongful payment of income taxes for the year 1946; and,
- (3) For the costs in this action incurred; and,
- (4) For such other and further orders as the court may deem proper.

/s/ EVERET L. HAGAN,
Administrator of the Estate of
J. A. Hagan, in Pro Per.

State of California,
County of Los Angeles—ss.

Evert L. Hagan, first being duly sworn, states: That he is the plaintiff in the above-entitled action; that he has read the complaint and is acquainted with its contents and knows of his own knowledge that the facts therein stated are true and correct.

/s/ EVERET L. HAGAN.

Subscribed and sworn to before me this 15th day of February, 1955.

/s/ Indistinguishable],
Notary Public in Said County
and State.

My Commission expires March 15th, 1957. [6]

Exhibit A

Form 843
U. S. Treasury Department
Internal Revenue Service

Claim

To be Filed With the Collector Where Assessment
Was Made or Tax Paid

Collector's Stamp: [Blank.]

The Collector will indicate in the block below
the kind of claim filed, and fill in, where required,
the certificate on the back of this form.

- Refund of Taxes Illegally, Erroneously, or
Excessively Collected.
- Refund of Amount Paid for Stamps Unused,
or Used in Error or Excess.
- Abatement of Tax Assessed (not applicable
to estate, gift, or income taxes).

Name of taxpayer or purchaser of stamps: Evert
L. Hagan, as Administrator of the estate of
James A. Hagan, deceased.

Street address: 115 N. Eastern Avenue, Los Angeles
22, California.

City, postal zone number, and State:

1. District in which return (if any) was filed:
Phoenix, Arizona.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from: Jan. 1, 1945, to Dec. 31, 1945.

3. Kind of tax: Income tax.

4. Amount of assessment, \$.....; dates of payment: Quarterly thru 1945 & Mar. 15, 1946.

5. Date stamps were purchased from the Government:

6. Amount to be refunded: \$592.04.

7. Amount to be abated (not applicable to income, estate, or gift taxes):

The claimant believes that this claim should be allowed for the following reasons:

The above tax was paid by James A. Hagan on account of income derived from the operations of a certain cheese manufacturing business known as the El Rey Cheese Company. A recent audit of the books and records of said business reveals that said payment was in error in that said business actually sustained a net operating loss during said period.

Further, the Government has made a deficiency determination and assessment against Evert L. Hagan, individually, the brother and general agent in fact of the taxpayer for the alleged earnings of said business for said taxable period, contending that said business did not belong to James A. Hagan but rather to Evert L. Hagan. In view of the above facts, the said payment was an overpayment of tax by James A. Hagan.

I declare under the penalties of perjury that this claim (including any accompanying schedules and

statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Dated, 19 . . .

/s/

Administrator of the Estate of
James A. Hagan, Deceased.

Exhibit B

U. S. Treasury Department
Office of the Director of Internal Revenue
140 W. Monroe Street Building
Phoenix Arizona

In replying to:

C:A:C:MM:Ba

Jan. 27, 1955.

Estate of James A. Hagan, Dec'd.,
Evert L. Hagan, Administrator,
115 North Eastern Avenue,
Los Angeles 22, California.

Claims for Refund of Income Tax for Years 1945
& 1946.

This letter refers to your claims for refund of income tax in the amount of \$592.04 for 1945 and \$3,181.95 for 1946.

In accordance with the provisions of section 3772(a) (2) of the Internal Revenue Code this

notice of disallowance in full of your claim is hereby given by registered mail.

By direction of the Commissioner:

WILSON B. WOOD,
District Director. [8]

Exhibit "C"

Form 843

U. S. Treasury Department
Internal Revenue Service
(Revised June, 1951)

Claim

To be Filed With the Collector Where Assessment
Was Made or Tax Paid

Collector's Stamp: [Blank.]

The Collector will indicate in the block below the kind of claim filed, and fill in where required, the certificate on the back of this form.

- Refund of Taxes Illegally, Erroneously, or Excessively Collected.
- Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

Name of taxpayer or purchaser of stamps: Evert L. Hagan, as Administrator of the estate of James A. Hagan, deceased.

Street address: 115 N. Eastern Avenue.

City, postal zone number, and State: Los Angeles 22, California.

1. District in which return (if any) was filed: Phoenix, Arizona.
2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from: Jan. 1, 1946, to Dec. 31, 1946.
3. Kind of tax: Income Tax.
4. Amount of assessment, \$.....; dates of payment: Quarterly thru 1946 & Mar. 15, 1947.
5. Date stamps were purchased from the Government:
6. Amount to be refunded: \$3,181.95.
7. Amount to be abated (not applicable to income, estate, or gift taxes):

The claimant believes that this claim should be allowed for the following reasons:

The above tax was paid by James A. Hagan on account of income derived from the operations of a certain cheese manufacturing business known as the El Rey Cheese Company. A recent audit of the books and records of said business actually sustained a net operating loss during said period.

Further, the Government has made a deficiency determination and assessment against Evert L. Hagan, individually, the brother and general agent in fact of the taxpayer for the alleged earnings of said business for said taxable period, contending that said business did not belong to James A. Hagan, but rather to Evert L. Hagan: In view of the above facts said payment was an overpayment of tax by James A. Hagan.

I declare under the penalties of perjury that this

claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Dated, 19. . . ,

/s/

Administrator of the Estate of
James A. Hagan, Deceased.

[Endorsed]: Filed Feb. 16, 1955.

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS

To: The Plaintiff, Evert L. Hagan in Pro Per.:

You Will Please Take Notice, that on Monday, May 23, 1955, at 10:00 o'clock a.m., or as soon thereafter as counsel can be heard, in Courtroom No. 4, before the Honorable William Byrne, in the Post Office and Court House Building, 312 N. Spring Street, Los Angeles 12, California, defendant United States of America, by and through its attorneys herein mentioned, will make a motion to dismiss the above action, with prejudice, as detailed in its Motion to Dismiss.

Dated: May 13, 1955.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division;

ROBERT H. WYSHAK, and

BRUCE I. HOCHMAN,

Assistant U. S. Attorneys;

/s/ ROBERT H. WYSHAK,

Attorneys for Defendant. [10]

[Title of District Court and Cause.]

MOTION TO DISMISS

Defendant moves the Court to dismiss this action on the grounds (A) that this Court lacks jurisdiction over the subject matter, and (B) that the complaint fails to state a claim upon which relief can be granted. The reasons relied upon are as follows:

1. Under Section 7422(a) of the Internal Revenue Code of 1954, no proceeding may be maintained in any Court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected until a claim for refund has been duly filed.

2. Section 322(b) of the Internal Revenue Code of 1939 which is here applicable to the question of filing of claims for refund (other than claims under Section 3801 of the Internal Revenue Code of 1939) provides that for a claim to be duly filed it must have been filed by the taxpayer within three years from the time the return was filed or within two years from the time the tax was paid. [11]

3. Paragraph V of the First Cause of Action in the complaint and paragraph III of the Second

Cause of action in the complaint allege the filing of claims for refund for the taxable years 1945 and 1946, respectively, on September 6, 1952.

4. The complaint does not allege the filing of returns for 1945 and 1946 within the three period prior to September 6, 1952, nor the payment of any tax for those years within the two year period prior to that date nor the filing of any agreement or agreements to extend the time limits contained in the applicable provisions of Section 322 of the Internal Revenue Code of 1939.

5. In addition, paragraph IV of the First Cause of Action in the complaint and paragraph II of the Second Cause of Action in the complaint allege a right of recovery under the provisions of Section 3801 of the Internal Revenue Code of 1939.

6. Section 3801(c) of the Internal Revenue Code of 1939 provides that any refund under Section 3801 shall only be made where a claim for refund thereunder has been made within one year following the determination relied upon.

7. Not only does the complaint fail to allege the date of the determination relied upon but completely fails to allege the filing of any claims for refund under Section 3801(c.)

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division;

ROBERT H. WYSHAK, and
BRUCE I. HOCHMAN,
Asst. United States Attorneys;

/s/ BRUCE I. HOCHMAN,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 13, 1955. [12]

[Title of District Court and Cause.]

ORDER GRANTING MOTION TO DISMISS

This cause came on to be heard on May 23, 1955, on the motion of the defendant, United States of America, to dismiss the complaint in the above-entitled cause with prejudice, on the grounds (A) that this Court lacks jurisdiction over the subject matter, and (B) that the complaint fails to state a claim upon which relief can be granted, and it appearing to the Court that said motion should be granted,

It Is Ordered that said motion to dismiss the complaint be granted and that the plaintiff, Evert L. Hagan, Administrator of the Estate of J. A. Hagan, may have leave to amend his complaint within 20 days from the date of this order.

Dated: This 2nd day of June, 1955.

/s/ WM. M. BYRNE,
Judge.

Presented by:

/s/ BRUCE I. HOCHMAN,
Assistant United States At-
torney.

Affidavit of Service by Mail.

Lodged May 24, 1955.

[Endorsed]: Filed May 24, 1955. [16]

[Title of District Court and Cause.]

FIRST AMENDED COMPLAINT

Plaintiff complains of the United States of America and alleges as follows:

I.

Jurisdiction of this action is conferred by Section 1346(a) (1) of Title 28 of the United States Code.

II.

Plaintiff is the duly qualified and acting administrator of the Estate of J. A. Hagan, and a citizen of the United States and resides at 115 N. Eastern Avenue, Los Angeles County, in the State of California.

III.

This action is one to recover an income tax erroneously and illegally assessed and collected without authority under the Internal Revenue Laws of the United States, pursuant to authority to sue by

Section 1346(a) (1) of Title 28 of the United States Code. [18]

IV.

Plaintiff alleges that upon March 15, 1946, J. A. Hagan, doing business as the El Rey Cheese Company made a return for the calender year 1945 for Federal Income Tax; that said return showed a net income subjecting the said J. A. Hagan to the payment of a tax in the amount of \$592.04 which amount was remitted along with the return to the Collector of Internal Revenue at Phoenix, Arizona.

Plaintiff alleges that the El Rey Cheese Company was a fictitious name registered by J. A. Hagan under the Civil Code of the State of California and doing business at 115 N. Eastern Avenue, Los Angeles, California. Plaintiff alleges that Evert L. Hagan was acting as attorney-in-fact in the management of said business for J. A. Hagan and that Evert L. Hagan had furnished operating capital to said business in an amount in excess of \$50,000.00. Plaintiff alleges that though the business was registered in the name of J. A. Hagan that by virtue of the various dealings of J. A. Hagan and Evert L. Hagan with said El Rey Cheese Company that there existed between J. A. Hagan and Evert L. Hagan, his brother, in fact a partnership.

Plaintiff alleges that upon January 9, 1950, the Commissioner of Internal Revenue filed a notice of Jeopardy Delinquent Tax Assessment against Evert L. Hagan for the year 1945 claiming deficiencies in

the sum of \$9,276.96, and based the same upon the alleged net income of the El Rey Cheese Company. Plaintiff alleges that Evert L. Hagan in the proper time filed a Petition in the United States Tax Court for redetermination of the tax liability for the year 1945. Plaintiff alleges that a re-audit of all the books, records and original papers of the El Rey Cheese Company for the year 1945 there was no actual net income to Evert L. Hagan or J. A. Hagan in any amount on account of the operations of the company for that year.

Plaintiff alleges that after the aforesaid re-audit of the records of the El Rey Cheese Company for 1945, an agent of the [19] Internal Revenue Bureau checked the same; that by stipulation in Docket No. 27441 United States Tax Court entitled "Evert L. Hagan, Petitioner, vs. Commissioner of Internal Revenue, Respondent" it was agreed there was no tax liability upon Evert L. Hagan for the year 1945 on account of the net income arising out of the operation of the El Rey Cheese Company; that the stipulation was adopted by the Tax Court in entering its decision disposing of the case and determining that there was no tax liability upon Evert L. Hagan upon January 19th, 1953.

Plaintiff alleges that said stipulation and the decision of the Tax Court constituted a determination such as contemplated under Section 3801 of the Internal Revenue Code; that the effect of the same with regard to the right of J. A. Hagan, the partner in fact of Evert L. Hagan, to claim a refund was to

allow for an adjustment, correction and refund notwithstanding the fact that the ordinary period limitation for claiming had run.

V.

On September 6, 1952, plaintiff filed with the Collector of Internal Revenue at Phoenix, Arizona, a claim for refund for \$592.04 plus interest, of the tax paid for the year 1945. A true copy said claim and of the statement attached thereto is hereto attached and marked "Exhibit A" and is by reference made a part of this complaint; that after the determination of the Tax Court January 19, 1953, in December of 1953, the representatives of the defendant corresponded with the plaintiff and indicated they were going to reject the claim; that thereafter on December 10, 1953, plaintiff still insisting upon his right to refund called the representatives of the defendant's attention to determination of the Tax Court; that thereafter in the months of April and May, 1954, there were conferences and correspondence following up the contention of the plaintiff that the determination of the Tax Court constituted a determination under Section 3801 of the I.R.C. Plaintiff hereto attaches all of said correspondence and by reference incorporates it in this Complaint as Exhibit "B." [20]

Plaintiff alleges that the correspondence and conferences which were initiated in December, 1953, constituted informal claim for refund under Section 3801 of the I.R.C., and that the representatives of

the defendant accepted them as such and dealt with the claim made in this manner the same as if it had been formally presented, and they purported to rule upon the merits of the claims and did not reject the claim because of the form in which it was presented.

VI.

Said demand for refund has been refused by the defendant through its Commissioner of Internal Revenue, in the form of a registered letter dated January 27, 1955, a true copy of which is attached hereto and incorporated herein, and is marked Exhibit "C."

VIII.

Plaintiff's claim does not exceed \$10,000.00 in amount.

And for a Second and Further Cause of Action:

I.

Plaintiff by reference realleges and reavers all of the allegations contained in Paragraphs I, II, III, VI and VII of his first cause of action to the same effect as if they were fully pleaded herein.

II.

Plaintiff alleges that upon March 15, 1947, J. A. Hagan doing business as the El Rey Cheese Company made a return for the calender year 1946; that said return showed a net income subjecting the said J. A. Hagan to the payment of an income tax in the amount of \$3,181.95, which amount was re-

mitted with the return to the Collector of Internal Revenue at Phoenix, Arizona.

Plaintiff alleges that the El Rey Cheese Company was a fictitious name registered to J. A. Hagan under the Civil Code of the State of California, and doing business at 115 N. Eastern Avenue, Los Angeles, California. Plaintiff alleges that Evert L. Hagan was acting as attorney-in-fact in the management of said business [21] for J. A. Hagan, and that Evert L. Hagan had furnished operating capital to said business in an amount in excess of \$50,000.00. Plaintiff alleges that though the business was registered in the name of J. A. Hagan that by virtue of the various dealings of J. A. Hagan and Evert L. Hagan with said El Rey Cheese Company that there existed between J. A. Hagan and Evert L. Hagan, his brother, in fact a partnership.

Plaintiff alleges that upon January 9, 1950, the Commissioner of Internal Revenue filed a notice of Jeopardy Delinquent Tax Assessment against Evert L. Hagan for the year 1946 claiming deficiencies of approximately \$51,000.00, and based the same upon the alleged net income of the El Rey Cheese Company. Plaintiff alleges that Evert L. Hagan within the proper time filed a Petition in the United States Tax Court for a redetermination of the tax liability for the year 1946. Plaintiff alleges that a re-audit of all the books, records, and original papers of the El Rey Cheese Company for the year 1946 showed there was no actual net income in any amount on account

of the operations of the El Rey Cheese Company for that year.

Plaintiff alleges that after the aforesaid re-audit of the records of the El Rey Cheese Company for 1946, an agent of the Internal Revenue Bureau check the same; that by stipulation in Docket No. 27441 United States Tax Court entitled "Evert L. Hagan, Petitioner, vs. Commissioner of Internal Revenue, Respondent," it was stipulated there was no tax liability upon Evert L. Hagan for the year 1946 on account of the net income arising out of the operations of the El Rey Cheese Company; that the stipulation was adopted by the Tax Court in entering its decision disposing of the case and determining that there was no tax liability on Evert L. Hagan upon January 19, 1953.

Plaintiff alleges that said stipulation and the subsequent decision of the Tax Court adopting it constituted a determination as contemplated under Section 3801 of the I.R.C.; that the effect [22] with regard to the right of J. A. Hagan, the partner in fact of Evert L. Hagan, to claim the tax refund herein involved was to allow an adjustment, correction and refund notwithstanding the fact that the ordinary period of claiming the same had run.

III.

On September 6, 1952, plaintiff filed with the Collector of Internal Revenue at Phoenix, Arizona, a claim for refund for \$3,181.95 plus interest, of the tax paid for the year 1946. A true copy of said claim and the statement attached thereto is hereto attached

and incorporated herein, marked Exhibit "D"; that after the determination of the Tax January 19, 1953, the representatives of the defendant corresponded with the plaintiff and indicated they were going to reject the claim; that thereafter on December 10, 1953, plaintiff answered said correspondence and called their attention to the decision of the Tax Court; that thereafter in the months of April and May, 1954, the plaintiff conferred with representatives of the defendant and corresponded with them following up the contention of the plaintiff that the determination of the Tax Court constituted a determination under Section 3801 I.R.C. Plaintiff hereto attaches all of said correspondence and by reference incorporates it in this Complaint as Exhibit "B."

Plaintiff alleges that the correspondence and conferences which were initiated in December, 1953, constituted an informal claim for refund under Section 3801 of the I.R.C., and that the representatives of the defendant accepted them as such and dealt with the claim made in this manner the same as if it had been formally presented, and they purported to rule upon the merits of the claim and did not reject it because of the form in which it was presented.

IV.

Said demand for refund has been refused by the defendant through its Commissioner of Internal Revenue, in the form of a registered letter dated January 27, 1955, a true copy of which [23] is

hereto attached and incorporated in this Complaint marked Exhibit "C."

Wherefore, plaintiff prays as follows:

- (1) For a judgment in the amount of \$592.04 plus interest, on account of the wrongful payment of income taxes for the year 1945; and,
- (2) For a judgment in the amount of \$3,181.95, plus interest, on account of the wrongful payment of income taxes for the year 1946; and,
- (3) For the costs in this action incurred; and,
- (4) For such other and further orders as this court may deem proper.

/s/ JESSE A. HAMILTON,
Attorney for the Plaintiff.

State of California,
County of Los Angeles—ss.

Evert L. Hagan, first being duly sworn deposes and says: That he is the plaintiff in the above-entitled action; that he has read the Complaint and is acquainted with its contents, and knows that the facts therein stated are true and correct.

/s/ EVERET L. HAGAN.

Subscribed and sworn to before me this day of June, 1955.

[Seal] /s/ JESSE A. HAMILTON,
 Notary Public in Said County
 and State.

My Commission expires July 28, 1955. [24]

Exhibit A

Claim

Name of taxpayer or purchaser of stamps: Evert L. Hagan, as Administrator of the estate of James A. Hagan, deceased.

Street address: 115 N. Eastern Avenue, Los Angeles 22, California.

City, postal zone number, and State

1. District in which return (if any) was filed: Phoenix, Arizona.
2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from: Jan. 1, 1945, to Dec. 31, 1945.
3. Kind of tax: Income Tax.
4. Amount of assessment, \$.....; dates of payment Quarterly thru 1945 & Mar. 15, 1946.
5. Date stamps were purchased from the Government.
6. Amount to be refunded: \$592.04.
7. Amount to be abated (not applicable to income, estate, or gift taxes).

The claimant believes that this claim should be allowed for the following reasons:

The above tax was paid by James A. Hagan on account of income derived from the operations of a certain cheese manufacturing business known as the El Rey Cheese Company. A recent audit of the books and records of said business reveals that said

payment was in error in that said business actually sustained a net operating loss during said period.

Further, the Government has made a deficiency determination and assessment against Evert L. Hagan, individually, the brother and general agent in fact of the taxpayer for the alleged earnings of said business for said taxable period, contending that said business did not belong to James A. Hagan but rather to Evert L. Hagan. In view of the above facts, the said payment was an overpayment of tax by James A. Hagan.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Dated , 19...

/s/

Administrator of the Estate of
James A. Hagan, Deceased.

Exhibit "B"

District Director of Internal Revenue
Audit Division
1031 South Broadway, Room 233
Los Angeles 15, California

12/1/53.

Mr. Evert L. Hagan,
115 N. Eastern Ave.,
Los Angeles 22, Calif.

Enclosed are Claim Withdrawal Forms for your signature.

A. S. ALLEN, IRA,
PR 4711, 1056. [26]

Dec. 10, 1953.

Mr. A. S. Allen,
Audit Division,
1031 So. Broadway,
Los Angeles, Calif.

Re: Claim for Refund, Estate of
J. A. Hagan 1945 & 1946.

Dear Sir:

Answering yours of 12/1/53 requesting that I sign a claim withdrawal form in the above-referred claims, I must refuse to do so.

You no doubt aware, or can become aware, that the government by stipulation agreed to a decision that has been entered by the United States Tax Court in Docket #27441 adjudged that I was not

Exhibit "B"
(Continued)

personally liable for any taxes for these years. My brother's liability as associate or partner could be no greater than mine. Therefore if I owed nothing then he overpaid. This decision was entered January 19th this year.

Please reconsider the claims in the light of this additional fact.

Yours truly,

EVERT L. HAGAN. [27]

U. S. Treasury Department
Internal Revenue Service
Regional Commissioner
1250 Subway Terminal Building
417 South Hill Street
Los Angeles 13, California

April 19, 1954.

In Replying refer to

Ap: LA: AS-AWM

Mr. Everet Leo Hagan,
115 North Eastern Avenue,
Los Angeles 22, California.

Dear Mr. Hagan:

Subject: Estate of James A. Hagan, Deceased,
Evert Leo Hagan, Administrator,
115 North Eastern Avenue,
Los Angeles 22, California.

Exhibit "B"
(Continued)

The administrative file in the above-described case has been referred to this office for consideration pursuant to your request filed with the office of the District Director of Internal Revenue at Los Angeles, California.

In response to your request a conference has been arranged for 10 a.m., April 23, 1954, to be held at 1250 Subway Terminal Building, 417 South Hill Street, Los Angeles, California. At this conference you will be afforded an opportunity to present, in an informal manner, the facts, arguments or legal authority in support of your contentions. If practicable, any additional matter not previously submitted should be filed with the Appellate Division at least three days prior to the conference.

If for any reason, you will be unable to appear for conference on the date fixed above, please advise this office immediately upon receipt of this letter, stating the nearest date or dates on which you will be able to appear. In your reply please refer to the symbols Ap:LA:AS-AWM.

In the event you are represented by an attorney it is essential that proper power of attorney be filed with the office of the District Director of Internal Revenue or this office at or prior to the conference.

Exhibit "B"
(Continued)

Very truly yours,

JOSEPH B. HARLACHER,
Assistant Regional
Commissioner, Appellate.

By
Associate Chief,
Appellate Division. [28]

May 17, 1954.

U. S. Treasury Bureau,
Internal Revenue Service,
Regional Commissioner,
1250 Subway Terminal Bldg.,
4175 S. Hill St.,
Los Angeles 13, Calif.

In Re: Ap:LA:AS-AWM

Subject: Estate of James A. Hagan, Deceased,
Evert L. Hagan, Administrator,
115 N. Eastern Ave.,
Los Angeles 22, Calif.

Attention: Mr. Mitchell, Appellate Division.

Gentlemen:

Pursuant to our conference of April 23rd, 1954,
I have had my attorney look into the question of

Exhibit "B"
(Continued)

whether or not the statute of limitations acted as a bar to the above-described claim. After somewhat conclusive study it is his opinion that the bar of the Statute of Limitations is removed by the effect of Section 3801 Internal Revenue Code. The facts will show that though no formal partnership had been entered into between myself and J. A. Hagan in the operation of the El Rey Cheese Company that in effect it was a family partnership, and other courts have on a full review of the facts in effect so held. This being so the effect of the determination with regard to my tax liability during the years 1945 and 1946 when this relationship existed would have the effect of allowing for an adjustment in face of the regular Statute of Limitations.

I believe you must be acquainted with Mertens "Law of Federal Income Taxation." To substantiate my position I quote from this Treatise upon the subject.

Vol. 2, page 396:

"The Internal Revenue Code contains a new provision, first introduced by the 1938 Act, of major importance in the ascertainment of tax liability not only for years covered by the 1938 Act and the Code but also prior years. It provides that in the inclusion of income or in taking a deduction on the determination of basis in a prior year, such error

Exhibit "B"
(Continued)

may be corrected notwithstanding that the ordinary period of limitations has run."

Page 410:

"The statute permits adjustment of the tax for prior or subsequent years in five cases and those only:

"(1) When a determination requires the inclusion in gross income of that which was erroneously included in the 'gross income' of a taxpayer for another taxable year. [29]

"(2) * * *

"(3) When a 'determination' requires the exclusion from gross income of an item with respect to which a tax was paid (for the current year) and which was erroneously excluded or omitted from the gross income of the tax payer for another taxable year."

Page 413:

"It has been previously indicated that one of the types of determinations permitting an adjustment under this Section (type 1) is the inclusion in gross income of an item which was erroneously included in the gross income of the tax payer for another taxable year or in the gross income of a related tax payer. Two examples as to the application of this provision are given in the regulation as follows:

Exhibit "B"
(Continued)

"Example (1): A taxpayer who keeps his books on the cash basis erroneously included in his return for 1933 an item of accrued rent. In 1938, after the period of limitations on refunds for 1933 has expired, the Commission discovered that the tax payer received his rent in 1934 and asserts a deficiency for 1934, which was sustained by the Board of Tax Appeals in 1941. An adjustment was authorized with respect to the year 1933. If the tax payer had returned the rent for both 1933 and 1934 and by a determination was denied a refund claimed for 1934 on account of the rent item, a similar adjustment is authorized.

"Example (3): A husband assigned to his wife salary to be earned by him in the year 1936. The wife included such salary in her separate return for that year and the husband omitted it. The commissioner asserted a deficiency against the wife for 1936 with respect to a different item of income and she contested that deficiency before the Board of Appeals. The wife would therefore be barred by Section 322(C) of the Rev. Act of 1936. Thereafter, the Commissioner asserts a deficiency against the husband on account of the omission of such salary from his return for 1936. The husband unsuccessfully contests the deficiency before the Board of Tax Appeals. An adjustment is authorized with respect to the wife's tax for 1936."

Exhibit "B"
(Continued)

Page 425:

"A 'determination' upon which the operation of these provisions may be predicated may take the form of a decision of the Tax Court.

"It has been suggested that cases which are closed on the basis of a stipulation giving effect to settlement agreements while pending before the Board will be included among the judgments considered to be a determination for this purpose."

27 Cal. L.R. 109 (1939).

Page 426:

"A determination may take the form of a final disposition of the claim for refund. Such disposition, the regulations indicate, may result in a determination with respect to two classes of items, i.e., items included by the tax payer in a claim for refund and items applied by the Commissioner to offset the alleged overpayment * * *"

Page 428:

"The statute requires that in applying the provisions dealing with adjustments a 'related tax payer' be treated as the tax payer. The effect of the merger of the two identities is to permit an adjustment in the case of the tax payer with respect to whom the error was [30] made although the determination was made with respect to a different tax payer. A related 'tax payer' is one who stands

Exhibit "B"
(Continued)

in a certain relationship to the taxpayer. These relationships are set forth in the statute as follows: 'A taxpayer who with the taxpayer with respect to whom a determination specified is made, stood in the taxable year with respect to which the erroneous inclusion, exclusion, omission, allowance or disallowance therein referred to was made, in one of the following relationships: (a) husband and wife, (b) grantor and fiduciary, (c) grantor and beneficiary, (d) fiduciary and beneficiary, legatee or heir, (e) decedent and decedent's estate or partner."

Page 430:

"One of the essential conditions precedent to the operations of these provisions is inconsistency of position, whether on the tax payer or the government, which operates adversely to the interests of the other party; in other words, the inconsistent position referred to is one maintained by the person other than the one entitled to the adjustment of the item in question, neither party can by his own conduct bring the statute into operation for his own benefit.

"For example, an adjustment which would result in additional assessment is authorized only if the taxpayer with respect to whom the determination is made has, in connection therewith, maintained a position which is inconsistent with the erroneous inclusion, exclusion, omission, allowance, disallow-

Exhibit "B"
(Continued)

ance, recognition or non-recognition, as the case may be, and such inconsistent position is adopted in the determination. An adjustment which would result in an additional assessment for some other year is not authorized if the Commissioner, and not the taxpayer, has maintained such inconsistent position."

Page 432:

"The application of these provisions in the case of related taxpayers is considerably circumscribed by the additional limitation that no adjustment by way of a deficiency assessment may be made against a related taxpayer unless the relationship existed both the taxable year with respect to which the error was made and at the time the taxpayer, with respect to whom determination is made, first maintained the inconsistent position as to the item with respect to the taxable year to which the determination relates. In general this means that when an inconsistent position is maintained in a return, claim for refund, or petition to the Board of Tax Appeals, for the taxable year in respect of which the determination is made, the requisite relationship must exist on the date of filing such document. The limitation does not apply if the adjustment would be made as if it were an ordinary overpayment, as that item is used in the Internal Revenue Code, and it is sufficient in such cases that the

Exhibit "B"
(Continued)

requisite relationship existed during the year the error is made."

See also 66 Harvard Law Review 225 (1952):

From the above as applied to the facts in my case as executor of the estate of J. A. Hagan it certainly appears (a) that there was a determination. And there was the maintenance in said determination of an inconsistent position as regards to the tax liability of the El Rey Cheese Company which varied from the liability assumed by J. A. Hagan when he paid the taxes that are now asked to be refunded. Therefore the government cannot under the provisions of Section 3801 of the Internal Revenue Code equitably assert the regular statute of limitations, and the matter should be open for adjustment and the refund should be granted.

I await your action upon this matter.

Yours very truly,

.....,
EVERT L. HAGAN. [31]

Exhibit "B"
(Continued)

U. S. Treasury Department
Internal Revenue Service
Regional Commissioner
1250 Subway Terminal Building
417 South Hill Street
Los Angeles 13, California

May 20, 1954.

In replying refer to
Ap:LA:AS-AWM

Estate of James A. Hagan, Deceased,
Evert L. Hagan, Administrator,
115 North Eastern Avenue,
Los Angeles 22, California.

Dear Mr. Hagan:

Subject: Claim for Refund—Estate of James
A. Hagan, Deceased.
Income Tax—Years 1945 and 1946.

This is in reply to your letter of May 17, 1954, whereby you contend that claims of the above taxpayer for the years 1945 and 1946 be allowed by reason that there has been a "determination under the income tax laws," namely, a decision by The Tax Court of the United States in the case of Evert L. Hagan, upon which the operation of the provisions of Section 3801 may be predicated.

Code Section 3801 provides for the mitigation of the statute of limitations in certain cases where, by

Exhibit "B"
(Continued)

virtue of a determination involving a particular year of a particular taxpayer, a correlative adjustment should be made for another year or for a related taxpayer.

The Tax Court, in its decision in the case of Evert Leo Hagan, Docket No. 27441, ordered and decided "That there are no deficiencies in income taxes or penalties due from, or overpayment due to, petitioner for the taxable years 1945 and 1946."

Your attention is called to the fact that by the decision of The Tax Court a "determination" was made that 1945 and 1946 returns of Evert Leo Hagan were accepted as filed. There was no finding that an inconsistent position had been taken by either Evert L. Hagan, or the Commissioner.

Therefore, the "determination" does not meet the requirements of Code Section 3801(b), "circumstances of Adjustment."

Very truly yours,

JOSEPH B. HARLACHER,
Assistant Regional
Commissioner, Appellate.

By
Associate Chief,
Appelate Division. [32]

Exhibit "C"

U. S. Treasury Department
Office of the Director of Internal Revenue
140 W. Monroe Street Building
Phoenix, Arizona

In replying refer to:

C:A:C:MM:ba

Jan. 27, 1955.

Estate of James A. Hagan, Dec'd.,
Evert L. Hagan, Administrator,
115 North Eastern Avenue,
Los Angeles 22, California.

Claims for Refund of Income Tax for Years 1945
& 1946.

This letter refers to your claims for refund of income tax in the amount of \$592.04 for 1945 and \$3,181.95 for 1946.

In accordance with the provisions of section 3772(a)(2) of the Internal Revenue Code this notice of disallowance in full of your claim is hereby given by registered mail.

By direction of the Commissioner:

WILSON B. WOOD,
District Director. [33]

Exhibit D

Claim

Name of taxpayer or purchaser of stamps: Evert L. Hagan, as Administrator of the estate of James A. Hagan, deceased.

Street address: 115 N. Eastern Avenue, Los Angeles 22, California.

City, postal zone number, and State

1. District in which return (if any) was filed: Phoenix, Arizona.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from: Jan. 1, 1946, to Dec. 31, 1947.

3. Kind of tax: Income Tax.

4. Amount of assessment, \$.....; dates of payment Quarterly thru 1946 & Mar. 15, 1947.

5. Date stamps were purchased from the Government.

6. Amount to be refunded: \$3,181.95.

7. Amount to be abated (not applicable to income, estate, or gift taxes).

The claimant believes that this claim should be allowed for the following reasons:

The above tax was paid by James A. Hagan on account of income derived from the operations of a certain cheese manufacturing business known as the El Rey Cheese Company. A recent audit of the books and records of said business reveals that

said payment was in error in that said business actually sustained a net operating loss during said period.

Further, the Government has made a deficiency determination and assessment against Evert L. Hagan, individually, the brother and general agent in fact of the taxpayer for the alleged earnings of said business for said taxable period, contending that said business did not belong to James A. Hagan but rather to Evert L. Hagan. In view of the above facts, the said payment was an overpayment of tax by James A. Hagan.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Dated, 19 . . .

/s/,

Administrator of the Estate of
James A. Hagan, Deceased.

Receipt of copy acknowledged.

[Endorsed]: Filed June 20, 1955. [34]

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS FIRST
AMENDED COMPLAINT AND NOTICE
OF MOTION FOR MORE DEFINITE
STATEMENT

To: The Plaintiff, Evert L. Hagan, Administrator
of the Estate of J. A. Hagan, and His Counsel
Jesse A. Hamilton:

You Will Please Take Notice, that on Monday,
July 18, 1955, at 9:45 a.m., or as soon thereafter as
counsel can be heard, in Courtroom No. 4, before
the Honorable William Byrne, in the Post Office
and Courthouse Building, 312 N. Spring Street, Los
Angeles 12, California, defendant United States of
America, by and through its attorneys herein men-
tioned, will make a motion to dismiss the Frist
Amended Complaint with prejudice as detailed in
its Motion to Dismiss in the alternative for a more
definite statement.

Dated: June 30, 1955.

LAUGHLIN E. WATERS,

U. S. Attorney;

EDWARD R. McHALE,

Asst. U. S. Attorney, Chief,
Tax Division;

ROBERT H. WYSHAK, and
BRUCE I. HOCHMAN,

Asst. U. S. Attorneys;

/s/ BRUCE I. HOCHMAN,
Attorneys for Defendant. [36]

[Title of District Court and Cause.]

MOTION TO DISMISS FIRST AMENDED
COMPLAINT AND MOTION FOR A MORE
DEFINITE STATEMENT

The defendant incorporates by reference the Motion to Dismiss the complaint filed on May 13, 1955. The Motion to Dismiss the complaint and Memorandum of Points and Authority in Support of Motion to Dismiss are deemed to be incorporated by reference in this present Motion to Dismiss the First Amended Complaint. In the alternative the defendant moves the Court to require the plaintiff to make his complaint more definite and certain regarding the following aspects:

(1) The complaint is indefinite and uncertain in that it does not state when and where and by what authority the plaintiff qualifies and acts as the administrator of the Estate of J. A. Hagan.

(2) The complaint is indefinite, vague and uncertain in that it does not state whether the plaintiff, if duly qualified in acting as the administrator of the Estate of J. A. Hagan, has the requisite, authority and power to bring this action. [37]

Dated: June 30, 1955.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division;

ROBERT H. WYSHAK, and
BRUCE I. HOCHMAN,
Assistant U. S. Attorneys;

/s/ BRUCE I. HOCHMAN,
Attorneys for Defendant. [38]

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 30, 1955. [39]

[Title of District Court and Cause.]

MINUTES OF THE COURT—JULY 21, 1955

Present: Hon. W. M. Byrne, District Judge.

Proceedings:

It Is Ordered that motion to dismiss is granted with 20 days leave to amend.

Counsel for defendant is directed to prepare, serve, and lodge formal order pursuant to Local Rule 7.

Counsel notified.

JOHN A. CHILDRESS,
Clerk.

By SEITZ,
Deputy Clerk. [41]

United States District Court for the Southern
District of California, Central Division

No. 17876-WB Civil

EVERT L. HAGAN, Administrator of the Estate
of J. A. Hagan,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER GRANTING MOTION TO DISMISS

This cause came on to be heard on July 18, 1955, on the motion of the defendant, United States of America, to dismiss the First Amended Complaint in the above-entitled cause with prejudice, on the grounds (A) that this Court lacks jurisdiction over the subject matter and (B) that the complaint fails to state a claim upon which relief can be granted; the plaintiff having consented to the granting of this motion by not filing memorandum in opposition in accordance with Local Rule 3(d), and by not appearing at the hearing to oppose the motion, and it appearing to the Court that said motion should be granted,

It Is Ordered that said motion to dismiss the First Amended Complaint be granted and that the plaintiff, Evert L. Hagan, Administrator of the Estate of J. A. Hagan, may have leave to amend his

complaint within 20 days from the date of this [42] order.

Dated: This 10th day of August, 1955.

/s/ WM. M. BYRNE,
Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 1, 1955. [43]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: The United States of America, and Laughlin Waters, United States Attorney:

You and Each of You Take Notice, that the Plaintiff does hereby appeal to the United States Court of Appeals for the Ninth Circuit, from the Order of the above-entitled Court in the above-entitled Action dismissing the first Amended Complaint filed herein upon the Motion to Dismiss filed herein by the Defendant.

Dated: August 29th, 1955.

/s/ JESSE A. HAMILTON,
Attorney for Plaintiff. [45]

State of California,
County of Los Angeles—ss.

Evert L. Hagan, first being duly sworn deposes and says: That he is the Plaintiff in the above-entitled action, and the party who is taking the appeal

in the action; that the appeal is not taken for vexation and delay but because this affiant has been advised by his attorney that the appeal has merit; that the appeal is taken in good faith by this affiant in order to obtain an adjudication of his legal rights from the United States Court of Appeals.

/s/ EVERET L. HAGAN.

Subscribed and sworn to before me this 29th day of August.

[Seal] /s/ Illegible,

Notary Public in Said County
and State.

My commission expires March 15, 1957.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 30, 1955. [46]

[Title of District Court and Cause.]

STATEMENT OF POINT ON APPEAL

The only contention Plaintiff makes upon this Appeal is that the First Amended Complaint stated a valid and good Claim for Relief or Cause of Action. Briefly the whole matter resolves itself to the answer of this question:

Where during the years 1945 and 1946 two brothers have in fact been engaged in a partnership business, and one of the brothers makes an individual tax return for supposed profits from the busi-

ness for the years 1945 and 1946 showing himself to be subject to taxes and makes a payment of these taxes, and where the Commissioner of Internal Revenue then proceeds to make a deficiency assessment against the other brother for these years, and the matter of the deficiency assessment is by Petition taken to the U. S. Tax Court for redetermination of the tax liability for these years, and where a re-audit of the partnership books showed there were actually no net profit for these years, and where the Tax Court case was settled by a stipulation, later adopted as the decision of the Tax Court in the matter, to the effect [48] that there were no taxes due from the brother (who had made no return from these years), and where the estate of the first brother, who had made the erroneous payments, within the time allowed by Section 3801 of the Internal Revenue Code made an informal claim for refund and adjustment, which claim was not rejected because of the form in which it was presented, will not the provisions of Section 3801 I.R.C. extend the statute of limitations for filing of claims so that the estate of the brother-partner may claim benefit of the "determination" of the Tax Court, and be allowed to claim a refund of the taxes erroneously paid for the years 1945 and 1946?

Dated: Aug. 29th, 1955.

/s/ JESSE A. HAMILTON,
Attorney for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Aug. 30, 1955. [49]

[Title of District Court and Cause.]

REQUEST AND DESIGNATION OF PORTIONS OF THE RECORD FOR APPEAL

The Plaintiff, Evert L. Hagan, having filed Notice of Appeal from the Order of Dismissal of the First Amended Complaint in the above-entitled action, hereby requests that the Clerk of the above-entitled Court prepare and certify the following portions of the record as the record on appeal and transmit a true copy of the following to the United States Court of Appeals for the Ninth Circuit:

1. The First Amended Complaint.
2. The Motion to Dismiss the First Amended Complaint.
3. The Minute Order of the Court granting the Motion to Dismiss the First Amended Complaint.
4. The Judgment, if any is entered, made pursuant to said order dismissing the First Amended Complaint.
5. Notice of Appeal.
6. Cost Bond on Appeal.
- 6a. Statement of Point on Appeal.
7. Designation of portions of the record on appeal.

Dated: Aug. 29th, 1955.

/s/ JESSE A. HAMILTON,
Attorney for the Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 30, 1955. [51]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL AS REQUIRED BY RULE 73(C), FEDERAL RULES OF CIVIL PROCEDURE

Whereas, Evert L. Hagan, the plaintiff in the above-entitled action desires to give an undertaking to secure the payment of costs upon appeal in accordance with the provisions of Rule 73(c) of the Federal Rules of Civil Procedure.

Now Therefore, we the undersigned sureties, do hereby obligate ourselves, jointly and severally to the United States of America in the sum of Two Hundred and Fifty Dollars (\$250.00) to secure the costs on appeal in the above action as required by Rule 73(c) of the Federal Rules of Civil Procedure if the appeal is dismissed or the judgment affirmed, or of the costs such as the Appellate Court may allow if the judgment is modified. And said sureties consent and agree that in the case of default or contumacy of the said Evert L. Hagan or his attorney, the Court may upon notice to the said Evert L. Hagan of not less than 10 days, proceed summarily and render judgment upon this obligation and award execution thereon.

Witness our hands and seals this 29th day of August, 1955. [53]

/s/ GILBERT MONCADA.

/s/ L. C. McCRAY,

State of California
County of Los Angeles—ss.

Lowry C. McCray and Gilbert Moncada, the sureties whose names are subscribed to the above bond for costs upon appeal under Rule 73(c) of the Federal Rules of Civil Procedure, each being sworn, for himself says: I am a resident and freeholder in the County of Los Angeles, State of California, and am worth the sum of the undertaking specified, as the penalty thereof, over and above all my just debts and liabilities, exclusive of property exempt from execution. And the said sureties acknowledged that they had executed the bond attached.

/s/ L. C. McCRAY,

/s/ GILBERT MONCADA.

Subscribed and sworn and acknowledged before me this 29th day of August, 1955.

/s/ [Indistinguishable],

Notary Public in Said County
and State.

My commission expires March 15, 1957.

Approved:

/s/ WILLIAM M. BYRNE,

Judge, U. S. District Court.

Affidavit of service by mail attached.

[Endorsed]: Filed August 31, 1955. [54]

[Title of District Court and Cause.]

DEFENDANT'S ADDITIONAL DESIGNATION OF RECORD ON APPEAL

Comes Now the defendant-appellee United States of America, pursuant to Federal Rule of Civil Procedure 75(a), and within the time permitted, designates additional portions of the record and proceedings, to be included in the record on appeal as follows:

1. The Complaint served on March 16, 1955.
2. Motion to Dismiss filed May 13, 1955.
3. Memorandum of Points and Authorities in Support of Motion to Dismiss filed May 13, 1955.
4. Order Granting Motion to Dismiss filed June 3, 1955.
5. Motion to Dismiss First Amended Complaint and Motion for a More Definite Statement filed June 30, 1955.
6. Order Granting Motion to Dismiss filed August 10, 1955. [56]
7. Defendant's Additional Designation of Record on Appeal.

Dated , 1955.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant United States Attorney, Chief, Tax Division;

BRUCE I. HOCHMAN,
Assistant United States
Attorney.

/s/ BRUCE I. HOCHMAN,
Attorneys for Defendant- Ap-
pellee, U. S. of America.

Affidavit of service by mail attached.

[Endorsed]: Filed Sept. 9, 1955. [57]

United States District Court
For the Southern District of California
Central Division
No. 17876-WB Civil

EVERT L. HAGAN, Administrator of the Estate
of J. A. Hagan,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The defendant's motion to dismiss the first amended complaint for want of jurisdiction over the subject matter and for failing to state a claim upon which relief can be granted having been heard on July 18, 1955, and an order entered herein on August 10, 1955, granting the motion and granting the plaintiff, Evert L. Hagan, Administrator of the

Estate of J. A. Hagan, 20 days within which to amend his complaint and said amendment not having been filed within the time prescribed, now on motion of Laughlin E. Waters, United States Attorney, Edward R. McHale, Assistant United States Attorney, Chief, Tax Division, and Bruce I. Hochman, Assistant United States Attorney, attorneys for the defendant,

It Is Hereby Adjudged and Decreed that the above entitled action be and it hereby is dismissed [59] for want of jurisdiction of the subject matter and for not stating a claim upon which relief may be granted; that this dismissal is not to operate as an adjudication on the merits; that the plaintiff take nothing by virtue of the complaint; and that the defendant have its costs in the amount of \$35.00 to be taxed by the Clerk of the Court.

Dated: October 12, 1955.

/s/ WILLIAM M. BYRNE,
United States District Judge.

Presented by:

/s/ BRUCE I. HOCHMAN,
Assistant United States
Attorney.

Affidavit of service by mail attached.

Lodged: Oct. 3, 1955.

[Endorsed]: Filed, entered Oct. 12, 1955. [60]

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 61, contain the original

Complaint;

Notice of Motion to Dismiss, etc.;

Order Granting Motion to Dismiss;

First Amended Complaint;

Notice of Motion to Dismiss First Amended Complaint, etc.;

Order Granting Motion to Dismiss;

Notice of Appeal;

Statement of Point on Appeal;

Request & Designation of Portions of Record, etc.;

Defendant's Additional Designation of Record on Appeal;

Judgment;

and a full, true and correct copy of the Minutes of the Court for July 21, 1955, and Cost Bond on Appeal, in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in said cause.

I further certify that my fees for preparing the foregoing record amount to \$2.00, the sum of which has been paid by appellant.

Witness my hand and the seal of said District Court, this 28th day of November, 1955.

[Seal]

JOHN A. CHILDRESS,
Clerk,

By /s/ CHARLES E. JONES,
Deputy.

[Title of District Court and Cause.]

ORDER EXTENDING TIME IN WHICH
TO FILE NOTICE OF APPEAL

Pursuant to Motion of Plaintiff requesting an order extending time in which to file Notice of Appeal properly noticed for hearing on January 6, 1956, and heard by the Court on that date, all parties to this action being represented by their respective counsel of record, and good cause appearing therefore under Rule 73(a).

It Is Hereby Ordered that plaintiff may have to and including the 9th day of January, 1956, in which to file Notice of Appeal from the judgment entered in this action on October 12, 1955.

Dated: January 9, 1956.

/s/ WILLIAM M. BYRNE,
Judge of the District Court.

Approved as to form January 9, 1956.

LAUGHLIN E. WATERS,
United States Attorney.

By /s/ EDWARD R. McHALE,
Assistant U. S. Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed Jan. 9, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the United States District Court
and to the United States of America, and to
Its Attorney, Laughlin E. Waters, United
Attorney:

Please take notice that plaintiff, Evert L. Hagan,
hereby appeals to the United States Court of Appeals
for the Ninth Circuit from the judgment en-
tered and docketed in this action on October 12, 1955.

/s/ JESSE A. HAMILTON,
Attorney for Plaintiff.

Receipt of copies acknowledged.

[Endorsed]: Filed Jan. 9, 1956.

[Title of District Court and Cause.]

STIPULATION RE RECORD UPON APPEAL

It is hereby stipulated between plaintiff and defendant, through their respective counsel of record, as follows:

1. That the following documents be added to and made a part of the record on appeal in this action:
 - A. The order of the Court made January 9, 1956, extending time in which to file Notice of Appeal.
 - B. Plaintiff's Notice of Appeal filed January 9, 1956.
 - C. This Stipulation.
2. That the foregoing items and the record on appeal now in the hands of the Clerk of the Ninth Circuit Court of Appeals shall constitute the record on appeal in this action to the Ninth Circuit Court of Appeals.

Dated: January 9, 1956.

/s/ JESSE A. HAMILTON,
Attorney for Plaintiff,

LAUGHLIN E. WATERS,
United States Attorney,

By /s/ EDWARD R. McHALE,
Assistant U. S. Attorney.

[Endorsed]: Filed Jan. 9, 1956.

[Endorsed]: No. 14957. United States Court of Appeals for the Ninth Circuit. Evert L. Hagan, Administrator of the Estate of J. A. Hagan, deceased, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California Central Division.

Filed November 30th, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 14957

EVERT L. HAGAN, Admin. of the Estate of J. A.
HAGAN,

Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee.

ADOPTION BY THE APPELLANT OF THE
STATEMENT OF POINTS ON APPEAL
AND DESIGNATION OF THE RECORD
ON APPEAL HERETOFORE APPEAR-
ING IN THE TYPEWRITTEN TRAN-
SCRIPT OF THE RECORD

Comes now the Appellant in the above-referred appeal, appearing in propria persona, and hereby signifies to the Court that he adopts for the purposes of this appeal the Statement of Points on Appeal and Designation of the Record as is now contained in the typewritten transcript of the record upon appeal, to the same manner and with the same effect as if the same had been prepared in accordance with Rule of Court 17(6).

Dated: December 3rd, 1955.

/s/ EVERET L. HAGAN,
Appellant.

[Endorsed]: Filed Dec. 16, 1955.

[Title of District Court of Appeals and Cause.]

**APPELLEE'S ADDITIONAL DESIGNATION
OF RECORD ON APPEAL NECESSARY
TO BE CONSIDERED AND PRINTED**

Pursuant to Rule 17(6) of this Court, appellee hereby designates as necessary to be considered and printed for the record on appeal the contents of its additional designation of record on appeal filed in the District Court, as if set forth in haec verba here, and in addition, the following:

- (1) Judgment entered on October 12, 1955;
- (2) This designation.

Dated: This 22nd day of December, 1955.

LAUGHLIN E. WATERS,
United States Attorney,
EDWARD R. McHALE,
Assistant United States At-
tor, Chief, Tax Division,
BRUCE I. HOCHMAN,
Assistant United States
Attorney.
/s/ BRUCE I. HOCHMAN,
Attorneys for Appellee.

Affidavit of service by mail attached.

[Endorsed]: Filed Dec. 24, 1955.

